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No. 91-1496

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

IN RE: CAROLINA MOTOR EXPRESS, INC., DEBTOR

PETER C. REITER and
CALIFORNIA CONSOLIDATED ENTERPRISES INC.,
Petitioners,

v.

LANGDON M. COOPER, TRUSTEE
FOR CAROLINA MOTOR EXPRESS, INC.,
MARK & ASSOCIATES OF NORTH CAROLINA, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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April 15, 1992

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Langdon M. Cooper, Trustee for Carolina Motor Express, Inc. and Mark & Associates of North Carolina, Inc., hereby request that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit by Petitioners Peter C. Reiter and California Consolidated Enterprises, Inc. in March, 1992 be denied.

STATUTES INVOLVED

Section 10761(a) of the Interstate Commerce Act, 49 U.S.C. Section 10761(a) provides:

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of the rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

Section 10762(a)(1) of the Interstate Commerce Act, 49 U.S.C. Section 10762(a)(1) provides:

> A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices relate to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided for at least one year may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

Section 10701(a) of the Interstate Commerce Act, 49 U.S.C. Section 10701(a) provides that:

> A rate, classification, rule or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable. A through route established by such a carrier must be reasonable. Divisions of joint rates by those carriers must be made without unreasonable discrimination against a participating carrier and must be reasonable.

Section 11705 of the Interstate Commerce Act, 49 U.S.C. Section 11705 provides that:

> (a) A person injured because a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title [49 USCS §§ 10501 et seq.] or a freight forwarder does not obey an order of the Commission, except an order for the payment of money, may bring a civil action to enforce that order under this subsection.
>
> (b)(1) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title [49 USCS §§ 10501 et seq.] or a freight forwarder is liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under subchapter IV of chapter 107 of this title [49 USCS §§ 10761 et seq.].
>
> (2) A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title [49 USCS §§ 10501 et seq. or 10541 et seq.] is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this subtitle.
>
> (3) A common carrier providing transportation or service subject to the jurisdiction of the Commis-

sion under subchapter II or IV of chapter 105 of this title [49 USCS §§ 1052] et seq. or 10561 et seq.] or a freight forwarder is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

(c) (1) A person may file a complaint with the Commission under section 10701(b) of this title [49 USCS §§ 10521 et seq. or 10561 et seq.] or bring a civil action under subsection (b) (1) or (2) of this section to enforce liability against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title [49 USCS §§ 10501 et seq. or 10541 et seq.]: A person may begin a proceeding under section 10704 or 10705 of this title [49 USCS § 10704 or 10705] to enforce liability under subsection (b) (3) of this section by filing a complaint with the Commission under section 11701(b) of this title [49 USCS § 11701(b)].

(2) When the Commission makes an award under subsection (b) of this section, the Commission shall order the carrier to pay the amount awarded by a specific date. The Commission shall order the carrier to pay the amount awarded by a specific date. The Commission may order a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title [49 USCS §§ 10501 et seq. or 10541 et seq.] to pay damages only when the proceeding is on complaint. The person for whose benefit an order of the Commission requiring the payment of money is made may bring a civil action to enforce that order under this paragraph if the carrier does not pay the amount awarded by the date payment was ordered to be made.

(d) (1) When a person begins a civil action under subsection (b) of this section to enforce an order of the Commission requiring the payment of damages by a common carrier providing transportation sub-

ject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title [49 USCS §§ 10501 et seq. or 10541 et seq.], the text of the order of the Commission must be included in the complaint. In addition to the district courts of the United States, a State court of general jurisdiction having jurisdiction of the parties has jurisdiction to enforce an order under this paragraph. The finddings and order of the Commission are competent evidence of the facts stated in them. Trial in a civil action brought in a district court of the United States under this paragraph is in the judicial district (A) in which the plaintiff resides, (B) in which the principal operating office of the carrier is located, (C) if a rail carrier, through which the railroad line of that carrier ruins, or (D) or if a water carrier, in which a port of call on a route operated by that carrier is located. In a civil action under this paragraph, the plaintiff is liable for only those costs that accrue on an appeal taken by the plaintiff.

(2) All parties in whose favor the award was made may be joined as plaintiffs in a civil action brought in a district court of the United States under this subsection and all the carriers that are parties to the order awarding damages may be joined as defendants. Trial in the action is in the judicial district in which any one of the plaintiffs could bring the action against any one of the defendants. Process may be served on a defendant at its principal operating office when that defendant is not in the district in which the action is brought. A judgment ordering recovery may be made in favor of any of those plaintiffs against the defendant found to be liable to that plaintiff.

(3) The district court shall award a reasonable attorney's fee as a part of the damages for which a carrier is found liable under this subsection. The district court shall tax and collect that fee as part of the costs of the action.

STATEMENT OF THE CASE

Petitioner California Consolidated Enterprises, Inc. (hereinafter "CCE") is a broker of motor carrier transportation. It arranges transportation services of motor carriers operating under the authority of the Interstate Commerce Act (hereinafter the "Act"), 49 U.S.C. Section 10101 et seq. ((1982), for the shipping public. It provides these services pursuant to a license issued to it by the Interstate Commerce Commission (hereinafter "ICC" or "Commission") . CCE tendered traffic to Carolina Motor Express, Inc. (hereinafter "CMX") for transportation in interstate commerce.

Petitioner Peter Reiter is similarly a broker of motor carrier transportation, licensed by the Commission to perform these services. Peter Reiter also tendered traffic to CMX for transportation in interstate commerce.

The bankruptcy proceedings which have lead to this dispute, commenced with the filing of a petition under Chapter 11 by CMX a motor common carrier. This was later converted to a petition for relief under Chapter 7 of the United States Bankruptcy Code. Langdon M. Cooper was appointed Trustee (hereinafter "Trustee") of the estate while the proceedings were still under Chapter 11. As a motor common carrier, CMX had a tariff on file with the Commission. The tariff at issue here contained a provision, effective June 16, 1985, which provided that the carrier could collect a late payment charge of 1.25% per month on all freight bills which were not paid within 15 days of the delivery of that shipment. The tariff also contained a provision that the carrier was entitled to collect attorney's fees in an amount computed at 33% of the transportation and late payment charges, if it became necessary for the carrier to turn the account over to an attorney for collection. Plaintiff, Mark & Associates of North Carolina (hereinafter "Mark & Associates"), is a rate auditing company hired by the Trustee, pursuant to Court order, to audit the carrier's freight bills. Mark

& Associates audited the freight bills for shipments transported by CMX for Petitioners. The audit for CCE's shipments revealed freight undercharges in the amount of $58,793.03. The audit for Peter Reiter revealed freight undercharges in the amount of $13,795.73. The Trustee and Mark & Associates brought actions to collect these amounts in the bankruptcy court.

The bankruptcy court entered a final judgment for the Trustee and Mark & Associates, concluding that because the filed rate doctrine precluded Petitioners' assertion of equitable defenses to the carrier's undercharge claims, the carrier was entitled to recover regardless of its own actions. *See Cooper v. California Consolidated Enterprises*, 84 B.R. 979 (Bankr. W.D.N.C. 1988). On appeal, the district court reversed the final judgments of the bankruptcy court and referred to the ICC the question of whether the carrier's collection of undercharges would amount to an unreasonable practice. Respondents appealed the district court decision.

The Fourth Circuit vacated the district court's reversal of the bankruptcy court's judgment, remanded these cases to the district court with instructions that the judgment of the bankruptcy court be reinstated. Petitioners initially filed a Petition for Writ of Certiorari on February 4, 1992, however that petition was rejected by this Court and Petitioners refiled on March 16, 1992. Respondents opposition is thus timely filed. Petitioners, in their writ, claim the Fourth Circuit should have remanded the case back to the Commission for a determination of the reasonableness of CMX's rates prior to ordering Petitioners to pay CMX's filed rates.

REASONS WHY WRIT SHOULD BE DENIED

This matter presents a simple, straight forward undercharge action. Pursuant to the judgment of the bankruptcy court as affirmed and modified by the Fourth Circuit, the Trustee and Mark & Associates are entitled to

recover the undercharges. The statutes mandate that a common carrier charge and collect the filed tariff. This well established doctrine has been historically referred to as the "filed rate doctrine." This Court reiterated the importance of this doctrine in *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915) and its progeny, including the most recent affirmance of that doctrine in *Maislin Industries, U.S., Inc. et al. v. Primary Steel, Inc.*, 497 U.S. ——, 111 L.Ed. 2d 94, 110 S.Ct. 2759 (1990) ("Maislin"). This Court has never altered its view that the filed rate doctrine governs the legal relationship between common carriers and shippers. The filed rate doctrine compels a common carrier to collect and shippers to pay the carrier's filed rates. 111 L.Ed. 2d at 109. Likewise, the statutory foundation for the filed rate doctrine has never been changed. *Id.* at 111. The Fourth Circuit recognized that essential for the statutory purpose to remain intact is for the shipper to pay the filed rate first and then seek reparations.

Petitioners rely upon Supreme Court Rule 17(a) in seeking certiorari. Petitioners assert that there is a conflict among the circuits based upon contrary decisions in *Delta Traffic Service, Inc. et al. v. Transtop, Inc.*, 902 F.2d 101 (1st Cir. 1990); *Duffy v. BMC Industries, Inc.*, 938 F.2d 353 (2d Cir. 1991); *Orr v. Interstate Commerce Commission*, 912 F.2d 119 (6th Cir. 1990); *Western Transp. Co. v. Wilson & Co.*, 682 F.2d 1227 (7th Cir. 1982). Petitioners also assert an inconsistency with this Court's ruling in *United States v. Western Pacific R. Co.*, 352 U.S. 59 (1956).

Respondents recognize that the circuits are not in accord with respect to the rate reasonableness issue. However, the Supreme Court precedent is clear. A shipper must first pay the filed rate and then sue for reparations. Moreover, this Court's ruling in *Western Pacific* provides little assistance to Petitioners as *Western Pacific* involved a claim by the U.S. Government, which has always been

accorded an exception to the filed rate. *See* 49 U.S.C. Section 66. Also, *Western Pacific* turned on a technical issue, as the specific commodity being shipped was not listed in any tariff. Thus, the technical expertise of the ICC was required to analyze the reasonableness of two filed rates in order to determine which commodity rate should apply to those shipments.

Although there exists a conflict among the circuits, it is believed that the Fourth Circuit has properly interpreted Supreme Court law and certiorari should be denied.

SUMMARY OF ARGUMENT

This matter raises a simple issue, does the Interstate Commerce Act allow a shipper, who refuses to pay a motor carrier's filed rate, to argue that the rate is unreasonable, delay paying for years, and thereby disrupting the flow of commerce. This Court in *Arizona Grocery Co. v. Atchison T. & S.F.R. Co.*, 284 U.S. 370 (1932) and the Fifth Circuit in *Supreme Beef Processors, Inc. v. Yanquinto*, 864 F.2d 388 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 3254 (1990), understood the constraints of the statute—pay the filed rate and then challenge the reasonableness of the rate through a reparations action. The Fourth Circuit, cognizant of the statutory scheme, agrees with this Court and the Fifth Circuit. *See In re Carolina Motor Express, Inc.*, 949 F.2d 107 (4th Cir. 1991).

ARGUMENT

I. PETITIONERS' POSITION WITH RESPECT TO A RATE REASONABLENESS CHALLENGE IS CONTRARY TO SUPREME COURT PRECEDENT

Petitioners assert that this Court in *Maislin* reasserted that a shipper may assert a defense of rate reasonableness against a carrier seeking to collect its tariff rate. However, this Court has historically taken a different approach than the one suggested by Petitioners. In *Maislin*, the Court, citing the precedent in *Keogh v. Chicago &*

Northwestern R. Co., 260 U.S. 156, 163, 67 L.Ed. 183, 43 S.Ct. 47 (1922) explained:

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and *until suspended or set aside,* this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. . . . This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated.

111 L.Ed. 2d at 108 (citations omitted and emphasis supplied). The Court also cited with approval from *Arizona Grocery Co. v. Atchison, T. & S.F.R. Co.*, 284 U.S. 370 (1932), reaffirmed that the filed rate is the legal rate, however, the Interstate Commerce Act:

> did not abrogate, but [rather] expressly affirmed, the common-law duty to charge no more than a reasonable rate . . . . In other words, the legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable. Under [the Act] the shipper was *bound to pay* the legal rate; but if he could show that it was unreasonable he might recover reparation.
>
> The Act altered the commor law by lodging in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate. If the finding on this question was against the carrier, reparation was to be awarded the shipper, and only the enforcement of the award was relegated to the courts.

111 L.Ed. 2d at 110 (citation omitted and emphasis supplied). Thus courts are not free to allow shippers to litigate the issue of rate reasonableness while preventing the collection of the filed rate. The statute is clear, a shipper (other than the U.S.) must pay the filed rate and then seek reparations from the Commission.

II. IN FINDING RATE REASONABLENESS MAY BE PLED DEFENSIVELY CIRCUITS HAVE MISAPPLIED SUPREME COURT PRECEDENT.

Petitioners offer the opinions rendered by the First Circuit in *Transtop*; the Second Circuit in *BMC*; the Sixth Circuit in *Orr*; and the Seventh Circuit in *Western Transp.*; as cases allowing rate reasonableness to be a defense pled and opposite to the instant case. Respondents counter with the decision of the Court below and Fifth Circuit in *Supreme Beef*, coupled with Supreme Court precedent. A comparison of the cases reveals that *Transtop* had to be modified following *Maislin* because the First Circuit incorrectly read the statute and referred the unreasonable practice defense raised, the Fifth Circuit had no such problem as it interpreted the statute properly.

In *BMC* the Second Circuit was concerned with the status of the bankrupt carrier and the inability of the undercharged shipper to recover full value if the shipper was awarded reparations after paying the filed rate. This issue is dealt with by the Fourth Circuit in a substantive footnote. 949 F. 2d at 111-112 n.4. The Fourth Circuit readily acknowledged that the Bankruptcy Code adequately provides for this contingency. Likewise, the *Orr* case turned on a complicated statute of limitations issue which is not at issue in a bankruptcy case, as statutes of limitation are tolled for claimants upon the filing of the bankruptcy. *See* 11 U.S.C. Section 108(c). Finally, *Western Transp.*, is a case that deals with the unreasonable practices of a carrier not unreasonable rates.

In criticizing the Fifth Circuit decision in *Supreme Beef*, the First Circuit in *Transtop* completely misapplies the holding of this Court in *Burlington Northern, Inc. v. United States*, 459 U.S. 131 (1982). The First Circuit apparently believes *Burlington Northern* is limited somehow to efforts by "federal courts to enjoin the *future* application of rates the carrier had filed with the Interstate

Commerce Commission". *Transtop, Inc.*, 902 F.2d at 105 (emphasis in original). However, a full reading of *Burlington Northern* and cases upon which *Burlington Northern* relied is not so limited.

For example in *Burlington Northern*, the Court stated:

> Again, we noted that Congress channeled *all rate decisions* to the Commission in the first instance, that court-ordered relief interferes with the delicate balance the Act strikes between the competing interests of shipper and carrier, and that the equities favor allowing the railroads to charge more than the Commission may ultimately find reasonable because the Act gives the shippers a right to reparations while no such protection is given to the carriers . . .

459 U.S. at 140 (citations omitted and emphasis supplied).

As noted in the above quote, because "all rate decisions" are relegated to ICC review, courts may not interfere with the ratemaking process by staying the collection of a filed tariff. *See Keogh, supra*, 260 U.S. at 163 ("*unless* and *until* suspended or set aside" the filed rate controls). There is no language limiting the proscription against court injunction of the collection of filed rates to those circumstances when the Commission is considering future rates as opposed to past rates. The referring circuits have created a fiction which is not supported by the statute or Supreme Court law in an effort to bend over backwards to find relief for shippers presented with undercharge claims made by bankrupt cariers. It is important to note that when a carrier seeks to collect its filed tariff rate, neither the statute nor case law makes a distinction as to whether or not the carrier is solvent. Shippers who ship with common carriers are charged with constructive knowledge of the carriers' filed rate. *See generally Maxwell, supra*. Should a shipper seek reparations the ability of a carrier to pay a reparations judgment has never been part of the statutory scheme. Also, a shipper that

receives a reparations award does have a claim for the full amount against the carrier's bankruptcy estate, thus giving said shipper the same rights as other trade creditors entitled to money from the estate.

The filed rate doctrine, itself, is based on the fundamental distinction between "legal rates" and "lawful rates". *See Arizona Grocery*, 284 U.S. at 384-87. A "legal rate" is simply a rate which is contained in a tariff duly published and filed with the Commission as required by 49 U.S.C. Section 10761(a). A "lawful rate" is a legal rate, i.e., a duly filed and published tariff rate, which, in addition, has been found by the Commission to be reasonable under 49 U.S.C. Section 10701(a) and 10701(e), and otherwise in accordance with the requirements of the Interstate Commerce Act.

As this Court has stressed on numerous occasions, a shipper is obliged to pay the *legal rate* of a carrier even though these rates have not yet been established to be *lawful rates*. "The statute requires rigid observance of the tariff without regard to the inherent lawfulness of the rates specified." *Davis v. Portland Seed Co.*, 264 U.S. 403,425 (1924). Thus, if a shipper believes that a rate is unreasonable, i.e., is unlawful, its remedy is not to exercise self-help by refusing to pay the tariff rate as it does in this case, but is instead relegated to filing a complaint with the Commission seeking reparations. As the Supreme Court stated in *Pennsylvania Railroad Co. v. International Coal Mining Co.*, 230 U.S. 184,197 (1913):

> The tariff, so long as it was of force, was, in this respect to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation.

While the First Circuit cites *International Coal Mining* for the proposition that the shipper is entitled to

bring a suit against the carrier for reparation, (*See Transtop, Inc.*, 902 F.2d at 104), it completely ignores the above language, as well as the language from *Arizona Grocery* which clearly states that despite allegations of rate reasonableness, a shipper is "bound to pay" the filed rate of a carrier.

The principle of pay now and sue for reparations later was also approved by this Court in *Crancer v. Lowden*, 315 U.S. 631 (1942). In *Crancer*, the carrier brought suit to recover freight charges from the shipper. The case was tried without a jury and judgment was rendered in favor of the carrier. On appeal, the shipper argued that the district court erred in refusing to stay the action to collect the freight bills while the shipper sought a determination from the ICC as to whether or not the rates sought to be collected were "unjusted and unreasonable". This Court affirmed the decision below stating:

> . . . The issue of the reasonableness of the rates was not open to the District Court. The meaning of the tariff had been determined by the Commission. *It remained to the railroad only to collect the rates for which the tariff called and for the District Court only to see that the railroad did collect them* 'Until changed, tariffs bind both carriers and shippers with the force of law . . .'

315 U.S. at 635 (emphasis supplied).

This Court further explained the problems associated with a stay for purely reasonableness determinations:

> . . . If the trial judge had in the exercise of his discretion continued the trial of the cause until such time as the Commission had passed upon the reasonableness of the rate, the delay might have made it impossible for the carrier to produce the witnesses who had made the inspection of the shipments. On the other hand, the petitioners suffered no hardship as a result of the trial court's insistence on proceeding with the trial. If petitioners pay the judgment in this case and the Commission should in the still pending proceeding decide to modify the tariffs, petitioners can obtain a complete remedy by way of reparation.

315 U.S. at 636.[1]

While Petitioners might respond that after paying the legal rate, any action for reparations might result in a money judgment which would be paid at only a fraction of its value through the bankruptcy proceeding, this still does not mean it has not obtained "a complete remedy." Certainly, any other shipper who has paid the filed tariff charges of a carrier who later seeks reparations also runs the risk of the carrier ultimately filing bankruptcy prior to the collection of any reparations awarded.

Shippers have two statutory protections against the imposition of unreasonable rates by motor carriers. First, shippers have notice of the filing of rates and have had the opportunity to protest those rates prior to their effectiveness; thus, they are protected with regard to claims of rate reasonableness. *See* 49 U.S.C. Section 10708. The second remedy—"reparations" pursuant to 49 U.S.C. Section 11705(b)(3) —is more limited and cannot be used as a shield to prevent the collection of legal rates.

Indeed, pursuant to Congressional authorization, the Commission has promulgated regulations which strictly limit the extension of credit and require collection of the tariff rate within, at most, thirty days. *See* 49 C.F.R. Section 1320. The novel concept suggested by the referring circuits and Petitioners—that the tariff rate need not be paid as long as a rate reasonableness proceeding is pending before the Commission—threatens the integ-

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[1] It should be noted that *Crancer* was cited by this Court with approval in *Western Pacific* and thus remains good law today. *See BMC*, 938 F.2d at 357.

rity of the tariff system and the filed rate doctrine. So long as the court's function is limited to enforcing the terms of a tariff, then all disputes over reasonableness will be commenced only before the ICC. However, if courts selectively enforce tariffs based on equitable considerations (i.e. it is not fair to allow the collection of a rate before testing its reasonableness), then the temptation to involve courts in disputes over rate reasonableness becomes much greater.

CONCLUSION

Section 10761(a) is, from a statutory and *stare decisis* standpoint, a crucial element of our national transportation policy. It enables shippers and carriers to move freight at specific rates in a fashion that not only gives notice to all but forms the foundation of our transportation policy, anti-discrimination. The Fourth Circuit has affirmed the pre-eminence of that statutory provision and this Court should deny this petition for certiorari.

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